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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ALEX PUSHKAROW, Defendant and Appellant.	A148092 (Napa County Super. Ct. Nos. CR166251, CR157995)

Defendant Michael Alex Pushkarow appeals his conviction following a jury trial of two counts of first degree burglary, one count of misdemeanor shoplifting and one count of forgery, for which he was sentenced to 17 years' imprisonment. Defendant contends that an expert's DNA testimony included testimonial hearsay in violation of his Sixth Amendment confrontation right, that the evidence was not sufficient to support the burglary convictions, and that the trial court abused its discretion in denying his *Romero*[1] motion. We find no merit in these contentions and therefore shall affirm the judgement.

Factual and Procedural History

1. *Wooden Valley Road Burglary*

Carol Boyle and her husband, Patrick Boyle, lived on Wooden Valley Road (Wooden Valley) in Napa. The house was located in a secluded area, about 20 minutes away from downtown Napa. There were two ways to access the property: a gated main

[1] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.

driveway and a driveway in the back of the house, with a gate and lock combination, primarily an exit for fire protection.

In February 2013, the Boyles were spending a two-week vacation in Palm Desert, planning to return home on March 9. Before leaving, they "lock[ed] everything up and le[ft]."

Juan Garcia, a mail carrier for the United States Postal Service, assisted Patrick in maintaining his two-acre vineyard. Judy Schulte, a colleague of Garcia at the Postal Service, fed the Boyles's cats while they were traveling. On March 8, while working in the vineyard, Garcia noticed two empty gasoline cans among the grapevines. Garcia put the gasoline cans near the garage and noticed that a window to the garage had been broken. He saw nothing out of place but called Schulte to inform her about the garage window.

Schulte went to the home the next day. After noticing the broken garage window, she saw broken glass that came from a side door located further down the front porch. Schulte entered the home and saw "[s]tuff . . . everywhere. Just drawers open, things broken, [and the] gun cabinet was broken. . . ." In the mother-in-law apartment above the garage was "a mess, turned over and drawers open." She called Patrick and told him what she had discovered and, after checking, told him their Mini Cooper was missing. Schulte called the police.

Napa County Deputy Sherriff Erik Fisher responded to the burglary. He noticed tire tracks leading from the house to the chain-linked back gate, and on the garage floor below the broken window he found a piece of a blue rubber glove. He also observed pry marks near the second broken window. While inspecting the ransacked house and mother-in-law apartment he found more pieces of blue rubber gloves.

Fisher called Deputy Steven Paris to assist him and the two deputies dusted around 50 areas for latent fingerprints. They found only one small fingerprint. Fisher collected the glove pieces and put them in evidence bags.

When the Boyles returned home, they found many items missing, including Patrick's computer with all of his records, the Mini Cooper, silverware and a set of gold

flatware, checkbooks, six long rifles and a pistol, flat screen televisions, and Carol's jewelry.[2] The total loss of property was about $65,000.

Deputy Fisher entered the Mini Cooper and license plate into the stolen vehicle system. The next day, the Mini Cooper was located in the Sacramento area where the driver, Timothy Miller, had crashed into a parked vehicle and fallen asleep in the car. The car contained stolen property. Fisher met with the Boyles and showed them a photo lineup in which they did not identify Miller. Miller was later interviewed and arrested for possession of the stolen Mini Cooper.

Forensic examiner Jacqueline Shikowitz processed three latent lift cards from the burglary. Only one had sufficient ridge detail for comparison purposes. After completing a manual comparison, Shikowitz could not find a match to Miller or two other suspects.

Forensic examiner Krisha Lovitto reported to Detective Hurtado that she had found sweat and oils from the glove pieces found at the burglary that could be used to identify DNA. Hurtado obtained a search warrant for Miller's DNA. After obtaining a DNA swab from Miller, Hurtado sent the swab and the glove pieces to the Orchid Cellmark Forensics (Cellmark) in Dallas, Texas for testing. Miller's DNA was not a match.

Nearly a month after the burglary, Hurtado was told by Patrick Boyle that there had been fraudulent activity on his checking account. Patrick discovered through his bank statements that three checks had been written neither by him nor Carol. Two of the checks were written to CVS Pharmacy and the other was written to a Safeway in American Canyon. The check to Safeway had Patrick's name on it but not his signature. Safeway's asset protection manager identified the check and told Hurtado that it was used to purchase, among other things, a pack of Marlboro King cigarettes and Dreyers double fudge brownie ice cream. Hurtado was unable to recognize the person who wrote the check from the store's surveillance footage. However, an asset protection data analyst told Hurtado that a club card under the name Antonia Pushkarow was used to purchase

[2] The Mini Cooper, a silver service set, three long rifles, and flatware were eventually recovered.

the items. The CVS store in Napa did not have surveillance footage showing the relevant transactions.

2. *Big Ranch Road Burglary*

Elizabeth and Charles Cleveland lived on Big Ranch Road in Napa in 2013. The house was located in a rural area north of downtown Napa. In mid-March, Charles left for Thailand on a long-term assignment. Elizabeth joined him for about 10 days. Before leaving, Elizabeth locked the house. Their housekeeper cleaned the house the day before Elizabeth was to return home and then locked all the doors. Everything in the house seemed to be normal.

The next day Elizabeth drove into the driveway and noticed that one of the doors to their storage PODS was partially open. She walked to the front door where she saw a sticky substance on her windows. In the house she first noticed her china platter on the floor, other items missing from the dining room table, and beyond the dining room, the house in disarray. She called the police.

Napa Deputy Sheriff Bryan Sardoch was first to report to the scene. He did not notice any obvious signs of forced entry from the front of the residence but he did notice a broken glass panel on a breezeway with a rubber adhesive patch over the edge of the broken glass. He collected an adhesive covered by a piece of wax paper for fingerprint analysis.

Missing from the Clevelands' home were items Elizabeth had collected on her trips to Asia, Elizabeth's engagement ring and other jewelry, including a Suzanne Belperron necklace with an estimated value of $100,000, silver dishes, and Chinese decorative pieces. When Charles returned home from Thailand, he discovered that two of his shotguns were missing.

Charles and Elizabeth contacted Sardoch a week later to inform him that they had found a blue nitrile glove inside a cargo box in the breezeway near the broken window. Upon further investigation of the glove, Sardoch noticed a dot on the interior "that looked . . . like dried blood." Sardoch collected the glove and packaged it as evidence.

Detective Hurtado sent the glove to Cellmark for further processing. Cellmark informed Hurtado that there was a partial DNA profile from the glove and sent the profile to a law enforcement agency to be entered into the "Combined DNA Identification System."

Charles did not realize that his checkbooks had been stolen until he received letters from collection agencies. After obtaining copies of the checks, he found that two of the checks had his and Elizabeth's name on them but not their signatures. Another check had a driver license number written on it that was neither Charles's nor Elizabeth's, and the checks did not have the correct account number on them.

Detective Hurtado obtained from the Safeway in Healdsburg a receipt of the purchase made with a check in the amount of $67.29 for Marlboro King cigarettes and Dreyers double fudge brownie ice cream, among other things. The names of the account holders of the check were "E.H. Cleveland" or "C.A. Cleveland" but the person used a club card belonging to Antonia Pushkarow.

Hurtado found an address for Antonia Pushkarow on Twin Oaks Road in Napa and learned that Antonia had a relative named Michael Pushkarow, the defendant. Defendant used Antonia's address for his business, All-Temp Heating & Air Conditioning.

Hurtado obtained from the CVS store surveillance tapes footage of a man purchasing a carton of cigarettes and writing a check. The man had a distinctive hairline and mustache that matched defendant's description. Hurtado located and arrested defendant. While in custody, defendant called his girlfriend at a phone number that was written on the check at the Healdsburg Safeway.

Elizabeth Cleveland told Hurtado that she had hired All-Temp to replace their heating and air conditioning. After the work was done she spoke with the owner, defendant, and told him she wanted sheetrock dust on the floors cleaned. Someone did come to clean the floors, but it was not properly done and she told defendant that she would not pay the remaining $2,000 balance until the floors were cleaned. Charles met with defendant on at least two occasions and told him that he would not make the final

payment until certain deficiencies in the work were corrected. After a few conversations with defendant, Charles did not hear from him again and did not give him his final payment.

3. *DNA Evidence*

DNA analyst Jill Cramer from Cellmark worked on two cases from the Napa County Sheriff's Department. Cramer received and tested the glove pieces found at the Wooden Valley burglary. All four pieces had one common DNA profile that she compared to Timothy Miller's DNA and determined that he was not the contributor.

Cellmark also tested DNA on the glove found after the Big Ranch Road burglary. The glove had a DNA mixture of at least two people. The numbers in defendant's profile matched all the numbers in the mixture, but the numbers were below the threshold necessary for an accurate comparison.

Hurtado obtained a DNA swab from defendant and sent the sample to Cellmark. Cramer analyzed the data from defendant's DNA swab and the DNA from the Wooden Valley burglary and determined that it was a complete match. Cramer affirmed that it was "next to impossible" that the DNA on the glove pieces found at the Wooden Valley residence came from somebody other than the defendant.

The jury found defendant guilty of two counts of first degree burglary of a residence (Pen. Code, § 459)[3] and that the property taken was in excess of $65,000 (§ 12022.6, subd. (a)(1)); one count of misdemeanor shoplifting (§ 459.5), and one count of forgery (§ 476). Defendant was sentenced to 17 years in prison with credits for time served and good conduct of 885 days. Defendant timely filed a notice of appeal.

Discussion

1. *The expert DNA testimony was nontestimonial and properly admitted.*

Defendant contends Cramer's DNA testimony included testimonial hearsay violating his Sixth Amendment right to confrontation and our Supreme Court's ruling in

[3] All statutory references are to the Penal Code unless otherwise noted.

People v. Sanchez (2016) 63 Cal.4th 665 (*Sanchez*). As the Attorney General asserts, the contention may have been forfeited by defendant's failure to object to this evidence on either hearsay or confrontation clause grounds. The futility exception that defendant raises arguably is inapplicable because, although *Sanchez* had not been decided at the time of trial and California law was then to the contrary, the cases on which *Sanchez* relied were available so that counsel might well have anticipated the change in the law. Nonetheless, under the circumstances we shall address the argument on the merits.

Hearsay evidence is generally inadmissible if the evidence is "a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Prior to *Sanchez*, an expert on direct examination could "generally base his opinion on any 'matter' known to [the expert], including hearsay not otherwise admissible." (*People v. Montiel* (1993) 5 Cal.4th 877, 918.) The expert could have also "explain[ed] the reasons for his opinions, including the matters he considered in forming them." (*Ibid.*) *Sanchez* adopted a more narrow rule for expert testimony: "an expert *cannot* . . . relate . . . case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.)

The Sixth Amendment gives the defendant "[I]n all criminal prosecutions . . . the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) Out-of-court testimonial statements may be admitted only if the witness is unavailable to be cross-examined and the defendant had a prior opportunity to cross-examine the witness. (*Crawford v. Washington* (2004) 541 U.S. 36, 68; *Sanchez, supra,* at p. 686.) *Sanchez* defined testimonial statements as statements "made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony," while nontestimonial statements "deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez, supra,* p. 689.)

Defendant argues that Cramer's expert DNA testimony contained testimonial hearsay since approximately 12 Cellmark employees analyzed the samples of DNA for the presence of blood, extracted DNA from the samples, multiplied the tiny samples of

DNA to samples sufficiently large to be analyzed, and took other steps to create DNA that could be analyzed, and none of these individuals testified. He asserts that the DNA report from the Wooden Valley burglary which Cramer read to the jury[4] constituted an out of court statement admitted for the truth of the matter asserted, was thus testimonial, and that its admission violated his right to confrontation.

For a statement to be testimonial, the statement "must be made with some degree of formality . . . [and] only if its primary purpose pertains in some fashion to a criminal prosecution." (*People v. Dungo* (2012) 55 Cal.4th 608, 619.) In *People v. Holmes* (2012) 212 Cal.App.4th 431, the Second Appellate District held that forensic analysis relied on by DNA experts was not testimonial hearsay and did not support a confrontation clause challenge. (*Id*. at pp. 438-439.) The defendant contended that his right to confront witnesses was violated because the DNA experts who testified "did not personally perform all of the testing upon which they relied in reaching their opinions." (*Id.* at p. 433.) The DNA samples were sent to Cellmark Laboratories in Texas and Pennsylvania. (*Id.* at pp. 433-434.) Over the defense's Confrontation Clauses objection, supervising criminalists from both Cellmark labs offered their opinions based on DNA tests they did not perform themselves. (*Id.* at p. 434.) The documents on which the experts based their opinions were displayed to the jury. (*Ibid.*) The court concluded that the reports on which the expert relied lacked formality and were unsworn statements that "merely record objective facts." (*Holmes, supra,* at p. 438, citing *Dungo, supra,* 55 Cal.4th at p. 619.) Although the materials did pertain to criminal prosecution and some of the analysis was performed after the defendant was targeted as a suspect, it still "lacked formality." (*Ibid*.)

Similarly in *People v. Steppe* (2013) 213 Cal.App.4th 1116, the Fourth Appellate District held that admission of a DNA analysis prepared by a person other than the expert

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[4] Based on the report Cramer compared defendant's DNA allele table with the DNA found at the Wooden Valley burglary and explained a statistical analysis showing the unlikelihood that the DNA of someone other than defendant matched the DNA from the burglary (in the "quintillions, which means it would be very rare, next to impossible, with the exception of having an identical twin").

testifying did not violate the defendant's right to confrontation. (*Id*. at p. 1118.) The court held that the reports on which the expert relied were not formalized statements, and therefore were nontestimonial. (*Id.* at p. 1122.) According to the court, " 'When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be . . . . The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both. [¶] It is also significant that in many labs, numerous technicians work on each DNA profile. [Citations.] When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures.' " (*Id.* at pp. 1122-1123, quoting *Williams v. Illinois* (2012) 567 U.S. 50, 85.) " 'If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forego DNA testing and rely instead on older forms of evidence . . . that are less reliable.' " (*Id.* at p. 1123, quoting *Williams*, 567 U.S. at p. 58.)

The Second Appellate District ruled on this issue again in *People v. Barba* (2013) 215 Cal.App.4th 712 and held that admission of the testimony of a laboratory director who did not analyze the DNA samples did not violate the defendant's right to confrontation. (*Id.* at p. 715.) The court ruled that "So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves is admissible." (*Id.* at p. 742.)

We agree with these decisions. The reports on which Cramer based her opinion were informal. These reports included chain of custody paperwork, logs of technicians and analysts completing particular tasks and the results of those tasks. The reports were created in the ordinary course of business and were not formalized documents such as an affidavit. (See *Crawford v. Washington*, *supra*, 541 U.S. at pp. 51-52.) The reports simply reflected the allele DNA sequences of both the DNA found on the glove pieces at the Wooden Valley burglary and of the defendant. Based on the numbers reflected in

these reports, Cramer compared the DNA profiles and opined that defendant's DNA matched the DNA found on the glove remnants from the Wooden Valley burglary. [5]

Defendant argues that a contrary conclusion is required by the decisions in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 and *Bullcoming v. New Mexico* (2011) 564 U.S. 647. The court in *Melendez-Diaz* held that affidavits reporting the results of forensic analysis were testimonial statements and the defendant was "entitled to 'be confronted with' the analysts at trial." (557 U.S. at p. 311.) The court stated that "under Massachusetts law the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance." (*Ibid.*) In *Bullcoming*, the court held the defendant had the right to confront the analyst who signed a certification that revealed his blood-alcohol concentration was above the threshold for aggravated driving while intoxicated. (564 U.S. at pp. 651-652.) However, unlike the situation in the present case, the formal documents received in evidence in those cases contained the relevant opinions of the person who was not available to be cross-examined. Here, none of the informal reports on which Cramer based her testimony expressed the conclusion that the two DNA's matched. Only Cramer expressed this opinion and she was cross-examined about the basis for that opinion.

The record reflects that the Cellmark laboratory in Dallas is a high input laboratory that uses a team approach to complete numerous tasks. For the most part, the work of these analysts and technicians involves putting reagents and samples on a

[5] We base our decision on the absence of formality or solemnity in the laboratory reports on which Cramer relied. We note that the reports in this case arguably also failed to meet the "primary purpose" criterion of a testimonial statement. Although the laboratory reports on which Cramer relied were connected to the criminal investigation, defendant's DNA was initially sent to Cellmark with respect to the Big Ranch Road burglary. Defendant was not considered to be a suspect in the Wooden Valley burglary until defendant's DNA was found to match the DNA from that burglary. The purpose of the DNA testing was not to establish a criminal case against defendant. However, the applicability of the primary purpose test in this context has been called into question. (See *Sanchez, supra,* 63 Cal.4th at pp. 687-694, and cases discussed therein.) We hold only that the laboratory reports are not testimonial because of their lack of formality, regardless of the purpose for which they were prepared.

machine and pressing the go button, making the process more computerized than manual. Cramer testified to the tasks performed by each technician, who she identified, and confirmed that there was no indication in the paper work that the technicians or analysts had tampered with the evidence. There was no error under either state or federal constitutional law in permitting her to express her opinion about the DNA match based on the reports she reviewed.

2. *There was substantial evidence to support both burglary convictions.*

Defendant contends that even if the DNA evidence was properly received, there was insufficient evidence to support either burglary conviction. The sufficiency of evidence is reviewed "in light most favorable to the judgment below to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 562.) The appellate courts "do not weigh the evidence but rather ask whether there is sufficient reasonable credible evidence of solid value that would support the conviction." (*People v. Russell* (2010) 187 Cal.App.4th 981, 988.) This standard applies whether direct or circumstantial evidence was used. (*People v. Towler* (1982) 31 Cal.3d 105, 118.) "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt." (*People v. Pierce* (1979) 24 Cal.3d 199, 210.)

Defendant argues that the only evidence that ties him to the burglaries is the DNA found on the blue nitrile glove remnants at the Wooden Valley residence. Defendant claims that the DNA evidence, which he compares to fingerprint evidence, is sufficient only if "found [on] an immovable object in an area of the burglarized structure that is inaccessible to the public." However, *People v. Huber* (1986) 181 Cal.App.3d 601, on which defendant relies, does not hold such evidence to be insufficient under other circumstances. The glove pieces with defendant's DNA found near the apparent entry points of the Wooden Valley home sufficiently connect defendant to that burglary. And the glove made of the same material found at the Big Ranch Road home tends to connect him to that burglary. Beyond that, both burglaries occurred while the homeowners were

away on vacation. Both occurred in rural areas where there was little to no contact with neighboring homes. Both burglaries employed similar access points for entry as evidenced by the broken glass at both locations. Both victims had their check books stolen and checks from both homes were used by defendant either at a CVS pharmacy or Safeway store to purchase similar goods. Finally, the Clevelands had a prior relationship with defendant that did not end amicably. The circumstantial evidence connects defendant to both burglaries. The jury had ample evidence to find him guilty of both burglaries beyond a reasonable doubt. It was "reasonable for the jury to infer that defendant was the perpetrator of those [crimes]." (*People v. Huber*, *supra*, 181 Cal.App.3d at p. 624.)

3. *The trial court did not abuse its discretion in denying defendant's Romero motion.*

Defendant also challenges the trial court's denial of his motion to dismiss his prior strike convictions. (*People v. Superior Court (Romero)*, *supra,* 13 Cal.4th at p. 504.) Under section 1385,[6] the court may vacate a prior offense if, "in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony conviction, and the particulars of his background, character, and prospects the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court's decision " 'will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." ' " (*People v. Superior Court (Alvaraz)* (1997) 14 Cal.4th 968, 978.) "Where the record demonstrates that the trial court balanced

[6] Section 1385, subdivision (a) reads: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading."

relevant facts and reached an impartial decision in conformity with the spirit of law, [the court] shall affirm the trial court's ruling, even if [the court] might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Defendant argues that the trial court abused its discretion since his previous offenses were nonviolent and his prior criminal history could be explained by his drug addiction. However, the trial court determined that defendant "committed two . . . very serious, sophisticated crimes that involved a substantial loss to the victims." The court did consider the gap between the current offenses and serious offenses committed in in the 1990's[7] and stated that, if the *Romero* motion had been made when defendant was convicted of drug offenses committed in 2012, there would have been a stronger case to grant it. Instead of addressing his drug issues after the 2012 offenses, the court observed that defendant continued to commit crimes, including possession of methamphetamine, petty theft and the current offenses. The court properly balanced all relevant facts and reasonably concluded that defendant was not "outside the scheme's spirit."

Disposition

The judgments are affirmed.

[7] Defendant was previously convicted of three felonies: assault with a deadly weapon, possession of stolen property and possession of methamphetamine. He has also been convicted of four misdemeanors.

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POLLAK, P. J.

WE CONCUR:

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TUCHER, J.

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BROWN, J.